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The International Tribunal for the Law of the Sea and Customary International Law

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I. INTRODUCTION

International law's significance has eclipsed the "Austinian handicap,"¹ according to which international law is not, in fact, "law."² Rare is the university law school that does not teach about the international legal system.³ There is much evidence of

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1. D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 6 (4th ed. 1991) (discussing jurist John Austin's denial that international law is real law and categorization of international laws as "laws improperly so-called"). The term "Austinian handicap" refers to John Austin's argument that there can be no legal system without a supreme sovereign answerable to no one else and a population owing allegiance to no other sovereign. See *id.* See also JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 31 (lecture i) (Isaiah Berlin et al. eds., Curwen Press 1954) (1832) ("[C]ustom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state."); M. W. Janis, Note & Comment, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405, 410 (1984) (noting that "[t]he most famous denial that international law is real law came from . . . John Austin").

2. HARRIS, *supra* note 1, at 6.

3. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* v (1996).

unprecedented growth in the number of ad hoc and specialized international tribunals⁴ that try individuals suspected of violating international law and attempt to settle disputes between States. Increasingly, national courts appear keen to try offenses international law regards as universal jurisdiction offenses.⁵ Due to the prominence of international law, many "domestic decisions are tempered by the need to comply with international obligations."⁶ Now, international scrutiny sometimes visits domestic courts that previously functioned without much publicity. As a result, the community of those interested in the efficacy of international law, or lack thereof, continues to grow. Central to this growth is the perceived legitimacy of international law norms. If reliance on and resort to international law is to be sustained, then efficiency of international judicial institutions must be maximized.

According to the Registrar of the International Tribunal for the Law of the Sea (Tribunal), the Tribunal's objective is "to be a user-friendly, cost-effective, *and efficient* institution."⁷ Perhaps the foremost requirement for achieving efficiency is to create rules in accordance with the system's recognized means of law creation⁸—before making arguments as to their equitable and consistent application.⁹ Increases in the number of permanent

4. See J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 292-298 (3d ed. 1998) (noting that "to some, the answer to all the world's problems is to be found in legal codes and international tribunals").

5. See *Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), 2 W.L.R. 827 (1999 H.L.) (holding that a Head of State, here Senator Augusto Pinochet, was not immune from extradition for offenses of torture or conspiracy to torture because there is no immunity under customary international law; thus, national courts may adjudicate cases involving these offenders).

6. Diana Woodhouse, *Introduction to THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS* 1 (Diana Woodhouse ed., 2000).

7. International Tribunal for the Law of the Sea (ITLOS), ITLOS/Press 16, (Oct. 20, 1998) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_16.htm> (quoting Registrar of the Tribunal, Mr. Gritakumar E. Chitty) (emphasis added) [hereinafter ITLOS/Press 16].

8. See H. L. A. HART, THE CONCEPT OF LAW 89-95 (1st ed. 1961) (arguing that only the unification of secondary rules of recognition, which establish the methods through which the norms of legal systems are formed, and the norms of the systems, which stipulate the rights and duties of the systems' subjects, can rid legal systems of the uncertainty inherent in rule-making).

9. See generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 150 (1990) (arguing that what leads most states voluntarily to comply with norms of international law is evidence in the international legal system of coherency in both the creation and application of rules); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (discussing different principles and perspectives on

and transitory international tribunals applying custom as a source of law make observance of this requirement a matter of prime concern.

II. BACKGROUND TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

A. Origin

The International Tribunal for the Law of the Sea is an independent international judicial institution established pursuant to the United Nations Convention on the Law of the Sea (UNCOLS).¹⁰ The UNCOLS is one of the most comprehensive international treaties of all time. It provides for the outer limits to which coastal states can claim jurisdiction in adjacent waters and regulates prominent issues such as fisheries and navigation.¹¹ An entire chapter of the UNCOLS is devoted to preventing the pollution of the marine environment.¹² The Convention pronounces the deep seabed's resources as "the common heritage of mankind"¹³ and sets up the International Seabed Authority to regulate the exploration and exploitation of the deep seabed.¹⁴ At present, 132 states are party to the UNCOLS,¹⁵ indicating widespread approval of the Convention.

The UNCOLS gives the Tribunal jurisdiction over a variety of international disputes between states, such as those involving fisheries, navigation, ocean pollution, and delimitation of maritime zones.¹⁶ The Tribunal also has compulsory jurisdiction over the prompt release of arrested vessels and their crews (in certain circumstances and under certain conditions),¹⁷ which the Tribunal has invoked in at least two of the three disputes it has thus far

how and why states choose or chose not to comply with international laws).

10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/Conf.62/122, reprinted in 21 I.L.M. 1261 (1982) [hereinafter Convention on the Law of the Sea].

11. See *id.* pt. II, §§ 1–2, at 1272–1273.

12. See *id.* pt. XII, at 1308–1315.

13. *Id.* pt. XI, § 2, art. 136, at 1293.

14. See *id.* pt. XI, § 4(A), arts. 156–158, at 1298.

15. See U.N. Press Release SEA/1675, UN—Meeting of States Parties to Law of Sea Convention Opens at Headquarters (May 22, 2000) <<http://www.health.fgov.be/WHI3/krant/krantarch2000/kranttekstmay/000524m06un.htm>>.

16. See Convention on the Law of the Sea pt. XI, § 5, art. 186, *supra* note 10, at 1306.

17. See *id.* pt. XV, § 2, art. 292, at 1323.

considered.¹⁸ Additionally, the Tribunal's Seabed Disputes Chamber¹⁹ has its own specialized jurisdiction over disputes arising out of pollution from seabed activities.²⁰

B. Sources of Law

Article 293(1) of the UNCLOS²¹ directs the Tribunal to apply the Convention provisions and other rules of international law not incompatible with the Convention.²² Article 293(1) appears to authorize the Tribunal to resort to customary international law as long as it is consistent with the Convention. Certainly, the Tribunal has applied customary international law in the cases it has thus far decided.²³ The UNCLOS, however, retains prominence and overrides other sources falling within Article 293(1)'s purview. Pursuant to Article 293(2), Article 293(1) does not prejudice the Tribunal's power to decide a case *ex aequo et bono*,²⁴ if the parties so agree.²⁵ This provision appears to authorize the Tribunal to resort to customary international law that is possibly inconsistent with the Convention if parties to a dispute choose. The ability of parties to choose the method and manner through which to resolve their disputes is one of the Convention's most revered virtues, hence its considerable success.²⁶

18. See Camouco (Pan. v. Fr.) (Int'l Trib. for the L. of the Sea, Feb. 7, 2000), available at <<http://www.un.org/Depts/los/ITLOS/5camouco.htm>> (application for prompt release and judgment); M/V "Saiga" (No. 2) (Saint Vincent & the Grenadines v. Guinea), 38 I.L.M. 1323 (1999) (Int'l Trib. for the L. of the Sea, July 1, 1999) (judgment), also available at <http://www.un.org/Depts/los/Judg_E.htm> [hereinafter M/V Saiga (No. 2)].

19. See Convention on the Law of the Sea pt. XI, § 5, art. 186-187, *supra* note 10, at 1307.

20. See *id.* pt. XII, § 5, art. 208, *supra* note 10, at 1310.

21. See *id.* pt. XV, § 2, art. 293(1), at 1324.

22. See *id.*

23. See, e.g., Camouco, paras. 61-73; M/V Saiga (No. 2), 38 I.L.M. at 1347-1352, paras. 110-138.

24. The term "*ex aequo et bono*" means "according to what is equitable and good" and is used "esp[ecially] in international law when a case by agreement of the principals is to be decided on grounds of equity and reason rather than specific points of law." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 790 (1986).

25. See Convention on the Law of the Sea pt. XV, § 2, art. 293(2), *supra* note 10, at 1324.

26. According to Article 287 of the Convention on the Law of the Sea:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation

C. Relationship with International Court of Justice (ICJ)

According to the Agreement on Cooperation and Relationship Between the United Nations and the International Tribunal for the Law of the Sea²⁷ which came into force on September 8, 1998 when adopted by the United Nations General Assembly at its 52nd Session,²⁸ the Tribunal formally entered a relationship with the ICJ, which is the principal judicial organ of the United Nations.²⁹ The Tribunal is now part of the system for the peaceful settlement of disputes³⁰ laid down in the United Nations Charter.³¹ The Tribunal also has "observer status" at General Assembly deliberations.³² Nonetheless, even where no formal link exists between the ICJ and other tribunals, practice shows that tribunals³³ readily invoke and apply rules of general international law the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), previously inaugurated.³⁴

or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Convention on the Law of the Sea pt. XV, § 2, art. 287, at 1322-1323.

27. Agreement on Cooperation and Relationship Between the United Nations and the International Tribunal for the Law of the Sea, *adopted* Sept. 8, 1998, G.A. Res. 52/521 U.N. GAOR, 52d Sess., 92d plen. mtg., Agenda Item 39(a), U.N. Doc. A/RES/52/521 (1998).

28. See ITLOS/Press 16, *supra* note 7.

29. See U.N. CHARTER art. 92.

30. See Convention on the Law of the Sea pt. XV, § 1, art. 280, *supra* note 10, at 1322.

31. See U.N. CHARTER art. 92.

32. See ITLOS/Press 16, *supra* note 7. "Observer status" entitles representatives of an organization to attend meetings when the organization, itself, is not a member of the meeting body. "Observers usually do not vote or sign documents but may participate in discussions." JAMES R. FOX, *DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW* 314 (1992).

33. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were established as ad hoc responses to events in their respective territories—jurisprudence emerging from these tribunals is filled with claims and counterclaims involving international law that other international tribunals declared as customary. See, e.g., *Prosecutor v. Dusko Tadic a/k/a "Dule,"* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. Former Yugo., Appeals Chamber, Oct. 2, 1995) reprinted in 35 I.L.M. 32, 48-49 (1996). See also generally *The International Criminal Tribunal for Rwanda: Summary of the Judgement in Jean-Paul Akayesu Case*, 11 AFR. J. INT'L & COMP. L. 336 (1999) (providing a summary of *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (Int'l Crim. Trib. Rwanda, Chamber I, Sept. 2, 1998)).

34. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59

D. The Difficulty

Notwithstanding existence or non-existence of special relationships with the ICJ, problems arise when, without further scrutiny, tribunals invoke and apply rules of customary international law previously inaugurated by other international tribunals. Consequently, the legitimacy of custom as a source of international law may further be aggravated. Previous judicial practice on custom led to the view that custom is a mysterious phenomenon amounting to "no more than a legal fiction."³⁵ A former ICJ judge perceived the use of custom as "both delicate and difficult."³⁶ The current work of the International Law Association Committee on the Formation of Customary International Law³⁷ and long and unrelenting publicist commentary³⁸ both suggest that tribunals' uncritical acceptance of

Stat. 1055, 1060, T.S. No. 933 (directing the ICJ to apply "international custom" in settling disputes) [hereinafter ICJ Statute].

35. N. C. H. Dunbar, *The Myth of Customary International Law*, 8 AUSTL. Y.B. INT'L L. 1, 18-19 (1983) (advocating the abandonment of the term "customary international law" in favor of international state practice or custom, qualified by adjectives such as general or particular).

36. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 175 (Feb. 20) (Tanaka, J., dissenting) [hereinafter *North Sea Continental Shelf*].

37. See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SEVENTH CONFERENCE HELD AT HELSINKI, FINLAND 623-646 (1996) (Customary (General) International Law).

38. See generally ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 66 (1971) (discussing *opinio juris*); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (2d rev. ed. 1993) (arguing that leaps in technological advances in recent years confound some of the assumptions previously held about formation of rules of customary international law because states now apply ever changing means to demonstrate their practice and beliefs about international law); Eduardo Jiménez de Aréchaga, *Customary International Law and the Conference on the Law of the Sea*, in ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS 575 (Jerzy Makarczyk ed., 1984) (arguing that the package deal approach states employed to arrive at the Convention's final text demonstrates new practice in treaty negotiation); Michael Akehurst, *Custom As a Source of International Law*, 1974-1975 BRIT. Y.B. INT'L L. 1 (expounding the consensual theory of custom); H. C. M. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT'L L. 1 (1984-1987) (analyzing the value of consent in the formation of customary international law); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1985 BRIT. Y.B. INT'L L. 1 (examining the dissenting state's function in the formation of customary international law); P. E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 1925 BRIT. Y.B. INT'L L. 20 (critiquing use of the term "source" in discourse regarding legislation creating international law agencies); Anthony A. D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987) (arguing that international tribunals are better at applying customary international law than at defining

rules that other tribunals previously declared as customary law may further weaken the legitimacy of using custom as a source of law. This decline in customary international law's perceived legitimacy should not be taken lightly because the majority of international law rules are customary in nature.³⁹

III. INTERNATIONAL TRIBUNALS' VIOLATION OF CUSTOM'S ENABLING PROVISION (ARTICLE 38(1)(B) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (ICJ STATUTE))

*A. Lessons from M/V "Saiga" (No. 2)*⁴⁰

Practice akin to indirect violation of custom's requirements appeared to occur when the International Tribunal for the Law of the Sea decided the merits of its very first case, *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*.⁴¹ The case arose from the Guinea Government's arrest of the Saiga oil tanker and its crew on October 28, 1997.⁴² The ship was provisionally registered in Saint Vincent and the Grenadines on March 12, 1997.⁴³ "The master and crew of the ship were all of Ukrainian nationality"⁴⁴ and there were three Senegalese nationals employed on board as painters.⁴⁵ Addax BV of Geneva, Switzerland owned the cargo of gas oil.⁴⁶ "The Saiga was engaged

it); Anthony A. D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969) (explaining the difficulty of proving state consent to the same practice); H. Meijers, *How is International Law Made?—The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 NETH. Y.B. INT'L L. 3 (1978) (insisting that the formal requirements established by custom's enabling provision—Article 38(1)(b) of the ICJ Statute—must be adhered to in the formation of rules of customary international law); M. H. Mendelson, *The Nicaragua Case and Customary International Law*, 26 COEXISTENCE 85 (1989) (arguing that the ICJ inaugurated a new norm of customary international law, without regard to ICJ Statute Article 38(1)(b)'s formal requirements) [hereinafter Mendelson, *The Nicaragua Case*]; Maurice Mendelson, *The Subjective Element in Customary International Law*, 1995 BRIT. Y.B. INT'L L. 177, 177 ("Whilst there is relatively little disagreement that State practice is an indispensable element, considerable controversy surrounds the nature of the subjective element." (footnote omitted)).

39. See MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 27 (3d ed. 1996).

40. 38 I.L.M. 1323 (1999).

41. See *id.* at 1335, para. 31.

42. See *id.*

43. See *id.*

44. *Id.*

45. See *id.*

46. See *id.*

in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa.”⁴⁷ The Guinea Government alleged that by importing gas oil into the customs radius (*rayon des douanes*) of Guinea, the Saiga violated Guinea’s domestic laws,⁴⁸ which control and suppress the sale of gas oil to fishing vessels in Guinea’s customs radius.⁴⁹ The Government of Saint Vincent and the Grenadines argued that the arrest of the Saiga and the subsequent actions of the Guinea Government were illegal under international law and that the Saiga had not violated Guinea’s domestic laws because it had not imported oil into Guinea.⁵⁰

Determination of whether Guinea’s arrest of the Saiga conformed with its obligations to Saint Vincent and the Grenadines under international law required the Tribunal to navigate and reconcile the difference between domestic jurisdiction and international jurisdiction. First, the Tribunal invoked the PCIJ decision⁵¹ in *Concerning Certain German Interests in Polish Upper Silesia*⁵² and second, it invoked Article 58 of the Geneva Convention.⁵³ These references indicated that the Tribunal was competent to determine whether the laws the Guinea Government relied on to impute wrongdoing to the Saiga were consistent with Guinea’s responsibility to other states under international law. In *Polish Upper Silesia*, the PCIJ ruled that customary law recognized an international tribunal’s competence to “examine the applicability and scope of national law.”⁵⁴ This formed the basis of the Tribunal’s determination that it was competent to consider the validity of Guinea’s domestic law. The Tribunal also adduced Article 58 of the Geneva Convention as further evidence of its competence.⁵⁵

47. *Id.*

48. *See id.* at 1347, para. 111.

49. *See id.* at 1349, para. 116.

50. *See id.* at 1347, para. 110; 1349, para. 117.

51. *See id.* at 1349, para. 120.

52. *See* *Concerning Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25) [hereinafter *Polish Upper Silesia*].

53. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 58, 75 U.N.T.S. 31, 66, T.I.A.S. No. 3362 [hereinafter *Geneva Convention I*].

54. *Polish Upper Silesia*, 1926 P.C.I.J. at 19 (ruling that the Court may review the question of whether or not, in applying Poland’s domestic law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention).

55. *See* *M/V Saiga* (No. 2), 38 I.L.M. 1323, 1349–1350, paras. 120–121, para. 131

Two points must be made regarding the Tribunal's approach. Firstly, applying the PCIJ's customary law declarations to legal questions under the Tribunal's consideration facilitates adjudication only to the extent that the rule of customary law invoked and applied was formed in compliance with Article 38(1)(b) of the ICJ Statute,⁵⁶ which is also known as the source of custom or as custom's enabling provision. Difficulties arise when a tribunal applies customary international law inaugurated by another tribunal in circumstances that do not meet the requirements in Article 38(1)(b). Two cases illustrate this difficulty: *Corfu Channel (United Kingdom v. Albania)*,⁵⁷ which was the first case to come before the ICJ, and *Military and Paramilitary Activities (Nicaragua v. United States)*.⁵⁸ Both cases demonstrate the danger of applying, without further scrutiny, rules other tribunals have inaugurated as "customary" international law.

B. Lessons from Corfu Channel

On October 22, 1946, two British cruisers and two destroyers entered the North Corfu Strait.⁵⁹ The channel they were following, which lay in Albanian waters, was considered safe, having been swept for mines in 1944, and again in 1945.⁶⁰ Nonetheless, one of the destroyers struck a mine and was gravely damaged.⁶¹ The other destroyer was sent to assist, and while towing the damaged destroyer, also struck a mine, and was seriously damaged.⁶² Forty-four British officers and sailors lost their lives, and forty-two others were wounded.⁶³ On May 15, 1946, prior to the Corfu Channel incidents, an Albanian warship fired in the direction of the two British cruisers.⁶⁴ The British

(1999). This is consistent with the Convention on the Law of the Sea. See Convention on the Law of the Sea annex VI, arts. 1(4), 20, 21, *supra* note 10, at 1345, 1348.

56. ICJ Statute art. 38, *supra* note 34, at 1060.

57. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9) (merits) [hereinafter *Corfu Channel*].

58. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (merits) [hereinafter *Nicaragua*].

59. See *Corfu Channel*, 1949 I.C.J. at 12.

60. See *id.* at 13-14.

61. See *id.* at 12 (the British destroyer, the H.M.S. *Saumarez*).

62. See *id.* at 13 (the British destroyer, the H.M.S. *Volage*).

63. See *id.* at 10.

64. See *id.* at 27.

Government protested arguing that innocent passage through straits was a right recognized by international law—the Albanian Government replied that foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior authorization.⁶⁵ To this, the British Government responded that if, in the future, the Albanian Government opened fire on a British warship passing through the channel, the British ship would return the fire.⁶⁶

In its response to the first of the parties' inquiries, the ICJ rejected the British Government's argument that the case's operative cause⁶⁷ originated in the Hague Convention VIII of 1907,⁶⁸ which obligates coastal states to inform other states of the danger to which they might expose themselves if they come within territorial waters they have reason to believe are unsafe.⁶⁹ According to the ICJ, the Hague Convention VIII's application is limited to war situations, and the setting in which the October 22 explosion occurred could hardly be described as a war situation, even though there was tension between the two parties.⁷⁰ Instead the ICJ reasoned that, the action resulted from what it called:

general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁷¹

Albania imposed upon itself the duty to warn the maritime community in general, and the approaching British vessels in particular, because Albania knew vessels sailing through its territorial waters would be exposed to the dangers of the mines.⁷² This duty originated from the customary "elementary

65. *See id.*

66. *See id.*

67. "Operative clause," as used herein, means the legal basis of a case.

68. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2322, T.S. No. 541 [hereinafter *Hague Convention VIII*].

69. *See Corfu Channel*, 1949 I.C.J. at 10 (referring to *Hague Convention VIII* art. 3, *supra* note 68).

70. *See id.* at 84.

71. *The Corfu Channel Case (Merits)*, Judgment of 9 April 1949, 1948-1949 I.C.J. Y.B. 57, 61 (emphasis added) [hereinafter *Corfu Channel Case (Merits)*].

72. *See Corfu Channel*, 1949 I.C.J. at 87.

considerations of humanity.”⁷³ Although the ICJ generously described this obligation as a “general and well-recognized” principle⁷⁴ of customary law, neither the United Kingdom Government nor the Albanian Government had previous knowledge thereof.⁷⁵

Because it invoked the 1907 Convention as the basis of its claim, the U.K. Government had to establish that Albania was bound by the Convention—this suggests that until the ICJ’s declaration in *Corfu Channel*, the principle of “elementary considerations of humanity” was not as recognized and accepted as the ICJ implied. This suggestion contrasts sharply with the ICJ’s boldness in describing the principle as both general and well-recognized.⁷⁶ This tendency of international tribunals to ordain hitherto-unknown customary international law norms as “general and recognized” is a great source of concern.

According to author Maurice Mendelson, the ICJ makes “bold statements about what it considers to be self-evident or axiomatic principles of customary international law, *without troubling very much, if at all, to identify the evidence in support of a proposition.*”⁷⁷ This system illustrates international tribunals’ practice of imposing rules of custom on international law simply because they chose to exercise their discretion, rather than because states have demonstrated sufficient state practice and *opinio juris* on the matter.

This practice directly violates ICJ Statute Article 38(1)(b), which seems to limit international tribunals’ liberty to inaugurate new norms of customary law to situations evidencing general and consistent state practice over a considerable time wherein the practicing states act under the belief that their conduct is

73. *Id.* at 22.

74. *Id.*

75. This argument is one that the ICJ itself would later deploy to deny Columbia’s claim in *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266 (Nov. 20). Of course the distinction between these two cases is that the former refers to general, while the latter refers to particular customary international law, if this significance is important at all. Compare Olufemi Elias, *The Relationship Between General and Particular Customary International Law*, 8 AFR. J. INT’L & COMP. L. 67 (1996) (proposing that this distinction matters in the emergence of norms of customary international law) with BEN CHIGARA, *LEGITIMACY DEFICIT IN CUSTOM: TOWARDS A DECONSTRUCTIONIST THEORY* ch. 4 (forthcoming Jan. 2001) (proposing that it might not).

76. See *Corfu Channel Case (Merits)*, *supra* note 71, at 61.

77. Mendelson, *The Nicaragua Case*, *supra* note 38, at 85 (emphasis added).

obligatory.⁷⁸ This process results in the mystification of the origin of law because it results in norms of customary international law manifesting both rules created in accordance with Article 38(1)(b) and those that international tribunals imposed on states without regard to Article 38(1)(b).

Perhaps when it inaugurated the customary law norm of "elementary considerations of humanity" the ICJ should have simultaneously confirmed consummation of states' practice and their sense of obligation on the matter. Only such a confirmation entitles an international tribunal to declare the emergence of a new customary international law norm. The question of whether manifestation of such state practice and *opinio juris* could have bypassed United Kingdom involvement, or at the very least, its attention, presents a real dilemma for the ICJ.

In *North Sea Continental Shelf (Germany v. Denmark, Germany v. Netherlands)*,⁷⁹ the ICJ later emphasized that the practice of specially affected states is central to the formation of customary law.⁸⁰ The United Kingdom is certainly a "specially affected" state regarding maritime activities. The probability that the requisite practice and obligation beliefs required to establish this new norm of customary law eluded the United Kingdom entirely is remote. Further, there is no reason why the U.K. Government would mount its case on a remotely applicable convention when it could have relied on a general and well-recognized principle of customary law. This illustrates the unlikelihood of consummation of the state practice and *opinio juris* required to justify such a declaration.

Casting doubt on the validity of the declaration's justification is the fact that the explosion in *Corfu Channel* occurred not long after the Second World War. At that time, having emerged from the War as one of the five super powers that took the initiative to rethink the new international order, British influence on international life was perhaps at its peak. As one of the five permanent members of the United Nations Security Council,⁸¹ the U.K. Government would have known if the Security Council had passed a resolution promoting the idea of common humanity in

78. See ICJ Statute art. 38(1)(b), *supra* note 34, at 1060.

79. 1969 I.C.J. 3 (Feb. 20).

80. See *id.* at 127-128.

81. U.N. CHARTER art. 23.

maritime matters. There is little support for the proposition that perhaps bilateral and multilateral treaties had incorporated this principle into international practice. In fact, there is a stark contrast between the ICJ's declaration of this self-evident principle and its reticence to justify its opinions with actual evidence.

Furthermore, discrediting the notion that this was a generally recognized and accepted idea is the presence of domestic pressure on the U.K. Government to address the Corfu Channel incident⁸²—it would not have missed the opportunity to invoke such a self-evident rule had it existed. Although the point shall not be belabored, the ICJ's inauguration of "elementary considerations of humanity" as a principle of customary international law carried with it a duty to justify its action. Nevertheless, the ICJ appeared content to declare the principle "customary law," without even attempting to demonstrate that the declaration was the result of the process of custom—and not of the ICJ's imagination. Had the ICJ been mindful to justify its action, it would have also had to specify (1) when the creative process started and finished, (2) what elements signified state practice and *opinio juris* in that process, (3) whether it was a smooth or difficult process, long or short, and more importantly, (4) that sufficient state practice and *opinio juris* were manifest.⁸³ Such specifications would have clarified what constitutes sufficient state practice and *opinio juris*.⁸⁴

C. Lessons from Nicaragua

In *Nicaragua*, the ICJ considered the interaction between treaty norms and custom.⁸⁵ The principles enshrined in Articles 2(4) and 51 of the United Nations Charter were at issue.⁸⁶ The United States' reservation as to the applicability of multilateral treaties when accepting the ICJ's jurisdiction under Article 36(2) of the ICJ Statute precluded application of Charter provisions in

82. See 427 PAR. DEB., H.C. (5th ser.) 1667–1669 (1946).

83. See ICJ Statute art. 38(1)(b), *supra* note 34, at 1060.

84. See Oscar Schachter, *Entangled Treaty and Custom*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 717, 718 (Yoram Dinstein ed., 1989).

85. See *Nicaragua*, 1986 I.C.J. 14, 94 (June 27). See also *North Sea Continental Shelf*, 1969 I.C.J. 3, 41 (Feb. 20).

86. See *Nicaragua*, 1986 I.C.J. at 22, 35.

cases to which it was a party.⁸⁷ Nonetheless, the Nicaraguan Government argued that principles similar to those in the U.N. Charter also existed under customary international law⁸⁸ and therefore, notwithstanding the United States' reservation, those principles were applicable to both parties.⁸⁹ The manner in which the ICJ determined this aspect of the dispute has attracted much attention.⁹⁰ According to the ICJ, "the Charter gave expression in this field to principles already present in customary international law and that law has in the subsequent four decades developed under the influence of the Charter to such an extent that a number of rules have acquired a status independent of it."⁹¹

The ICJ gave no explanation as to why state practice relative to the use of force since 1945 reflected "customary law" and not the states' compliance with Article 2(4) of the U.N. Charter, which prohibits the use of force against a sovereign state.⁹² ICJ Judge Jennings lamented that, having failed to apply the U.N. Charter as such, the Court applied portions of the Charter anyway by positing that such provisions have become customary law independent of the Charter.⁹³

The 1949 Geneva Conventions⁹⁴ were also relevant to the *Nicaragua* proceedings. The United States' reservation on the application of multilateral treaties precluded the Conventions' direct application *qua treaty*.⁹⁵ This situation once more presented

87. See *id.* at 34-35.

88. See *id.* at 35.

89. See *id.*

90. See Charlesworth, *supra* note 38, at 11. See generally John Lawrence Hargrove, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 135, 143 (1987) ("[I]t is not the business of the courts to send messages or stand up to litigants The business of courts is to apply the law and preserve the integrity of the legal order, without regard to any perceptions of relative power or moral purity of the parties. Just doing that well will be message enough."). See also Mendelson, *The Nicaragua Case*, *supra* note 38, at 85.

91. *Nicaragua*, 1986 I.C.J. at 96-97.

92. U.N. CHARTER art. 2(4).

93. See *Nicaragua*, 1986 I.C.J. at 532 (Jennings, J., dissenting).

94. Geneva Convention (I), *supra* note 53; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, T.I.A.S. No. 3363 [hereinafter Geneva Convention II]; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, T.I.A.S. No. 3364 [hereinafter Geneva Convention III]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, T.I.A.S. No. 3365 [hereinafter Geneva Convention IV].

95. See *Nicaragua*, 1986 I.C.J. at 113.

the ICJ with an opportunity to discuss how customary international law develops alongside conventional law.⁹⁶ The ICJ observed that the Geneva Conventions represented “in some respects a development, and in other respects no more than the expression of fundamental principles of general international law.”⁹⁷ The Court cited the following denunciation language, common to all four Geneva Conventions,⁹⁸ as an example of a proclamation of pre-existing customary international law:

shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.⁹⁹

This means that a state that withdraws from one of the Geneva Conventions “would nevertheless remain bound by the principles contained in it insofar as they are an expression customary international law.”¹⁰⁰

The ICJ cited Articles 1 and 3, common to all four Geneva Conventions as indicative of the Conventions’ transformation into customary international law.¹⁰¹ Article 1, perhaps one of the shortest provisions of the Conventions,¹⁰² states that “the High Contracting parties undertake to respect and to ensure respect for the present Convention in all its circumstances.”¹⁰³ The ICJ held that this meant that:

96. Identical treaty and customary rules can in fact exist side by side. The Court has stated that, “[E]ven if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary law, those norms retain a separate existence.” *Id.* at 95. The Court also suggested that these same identical rules may have different legal consequences qua treaty rules and qua customary rules. *See id.*

97. *Id.* at 113.

98. *See id.* at 113–114 (“[T]he Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such [fundamental general principles of humanitarian law]” (citing Geneva Convention I art. 63, *supra* note 53; Geneva Convention II art. 62, *supra* note 94; Geneva Convention III art. 142, *supra* note 94; Geneva Convention IV art. 158, *supra* note 94)).

99. Geneva Convention I art. 63, *supra* note 53, at 68.

100. Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT’L L. 348, 352 n.13 (citation omitted) (1987).

101. *See id.* at 352.

102. *See id.*

103. *See, e.g.*, Geneva Convention I art. 1, *supra* note 53, at 32.

there is an obligation on the United States Government, in terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances,' since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . .¹⁰⁴

The Court here implied that both Article 1 and Article 3 were reflective of pre-existing customary international law.¹⁰⁵ This conclusion is problematic because "there is no evidence, . . . that at that time the negotiating [s]tates believed that they were codifying an existing principle of law."¹⁰⁶ States appear to have chosen the words "'to ensure respect' deliberately 'to emphasize and strengthen the *responsibility of the [c]ontracting [p]arties*,'"¹⁰⁷ not to restate pre-existing customary international law or bring about the evolution thereof.

It is also apparent that the language "to ensure respect" appears for the first time in these Conventions—as "it was not used in earlier Geneva Conventions."¹⁰⁸ "[R]epetition of such prior usage would have strengthened the claim that the phrase is declaratory of international law."¹⁰⁹

D. Potential Violation of Custom in M/V Saiga

Nicaragua illustrates that international tribunals can tailor outcomes by inaugurating norms of customary international law without regard to the requirements of ICJ Statute Article 38(1)(b). Further application of the rules established through this belligerence by other international tribunals repeats the initial belligerence on Article 38(1)(b). This can only harm custom's perceived legitimacy as a source of law. Thus, when the International Tribunal for the Law of the Sea applied, without further scrutiny, general international law from the PCIJ's

104. *Nicaragua*, 1986 I.C.J. 14, 114 (June 27).

105. See Meron, *supra* note 100, at 352.

106. See *id.* at 353.

107. *Id.* at 353 & nn.15–16.

108. *Id.* at 353.

109. *Id.*

decision in *Polish Upper Silesia*,¹¹⁰ it created the potential for perpetuating belligerence toward custom. The Tribunal justified itself by demonstrating that in addition to *Polish Upper Silesia*, Article 58 of the UNLOSC also provided for application of the same principle¹¹¹ in that:

[T]he rights and obligations of coastal and other States under the Convention arise not just from the provisions of the Convention but also from national laws and regulations 'adopted by the coastal State in accordance with the provisions of this Convention.' Thus, the Tribunal is competent to determine the compatibility of such laws and regulations with the Convention.¹¹²

Having established that the *Saiga* was operating outside Guinea's territorial sea area when arrested, the Tribunal considered whether the Guinea Government's otherwise wrongful application of its customs laws to the exclusive economic zone was justifiable under general international law.¹¹³ The Guinea Government pleaded that its actions could be justified under the doctrine of "state necessity."¹¹⁴ The Tribunal referred to general international law¹¹⁵ in *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*,¹¹⁶ wherein the ICJ established that two conditions must be satisfied before the state of necessity defense can be invoked to justify an otherwise wrongful act, namely, that "(a) the act was the only means of safeguarding an essential interest of the [s]tate against a grave and imminent peril; and (b) the act did not seriously impair an essential interest of the [s]tate towards which the obligation existed."¹¹⁷

110. See *Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25).

111. See *M/V Saiga* (No. 2), 38 I.L.M. 1323, 1349–1350, paras. 120–121 (1999).

112. *Id.* at 1350, para. 121.

113. See *id.* at 1351, para. 132.

114. See *id.* at 1351–1352, para. 133.

115. See *id.* at 1351–1352, paras. 132–133.

116. See *Gabcíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 4 (Sept. 25).

117. *M/V Saiga* (No. 2), 38 I.L.M. at 1351–1352, para. 133 (quoting *Gabcíkovo-Nagymaros Project*, 1997 I.C.J. at 36–37 (quoting International Law Commission, Draft Articles on the International Responsibility of States art. 33, para. 1, in *Report of the International Law Commission on the Work of its Forty-eighth Session 6 May–26 July 1996*, U.N. GAOR, 51st Sess., Supp. 10, ch. III, U.N. Doc. A/510/10 (1996), available at (visited Aug. 20, 2000) <<http://www.un.org/law/ilc/reports/1996/96repfra.htm>> [hereinafter ILC Draft Articles])).

The Tribunal relied on the ICJ's view that these conditions must be satisfied and that this view reflected customary international law.¹¹⁸ The Guinea Government's appeal to the state necessity defense could not be sustained¹¹⁹ because, as the Tribunal explained:

however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.¹²⁰

Thus, customary international law formed the Tribunal's *raison d'être*¹²¹ in its determination of the legal question of whether the Guinea Government's wrongful application of its customs laws to the exclusive economic zone was justifiable under general international law.¹²²

The ICJ appeared to premise its declaration that the requisite conditions to be fulfilled before for a state may use the state necessity defense were general international law under Article 33, paragraph 1 of the International Law Commission (ILC) Draft Articles on the International Responsibility of States.¹²³ The ILC's function is to facilitate international law's progressive development through codification of customary international law.¹²⁴ Among the projects currently before the ILC are international state responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and crimes against the peace and security of mankind.¹²⁵ Therefore, the ILC's work is a good place to look for evidence of customary international law. Not all of the ILC's work, however, involves customary international law. Therefore, when tribunals point to the ILC's work as evidence of general

118. See *M/V Saiga* (No. 2), 38 I.L.M. at 1352, para. 134.

119. See *id.* at 1352, para. 136.

120. See *id.* at 1352, para. 135.

121. The term "*raison d'être*" means "reason or justification for existence." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 24, at 1877.

122. See *M/V Saiga* (No. 2), 38 I.L.M. at 1351, para. 132.

123. ILC Draft Articles art. 33, para. 1, *supra* note 117.

124. See HARRIS, *supra* note 1, at 66.

125. See *id.* at 67.

international law's existence, care still must be taken to ensure that Article 38(1)(b) of the ICJ Statute¹²⁶ is not circumvented.

IV. CONCLUSION

The International Tribunal for the Law of the Sea is a much-welcome development. It confirms the United Nations' commitment to establishing a universal regime governing the seas and oceans. The Tribunal breathes life into efforts to apply the regime of the seas to the UNLOSC, which came into force in 1994. According to the Tribunal Registrar, the Tribunal's objective is to become a "user-friendly, cost-effective, and efficient institution,"¹²⁷ and one that observes custom's requirements.¹²⁸

Article 293 of the UNLOSC authorizes the Tribunal to apply customary international law.¹²⁹ Emerging case law illustrates the Tribunal is ready to apply customary international law,¹³⁰ which has been described as a mysterious phenomenon amounting to no more than a "legal fiction"¹³¹ and as being "both delicate and difficult."¹³² Inaugurating rules of customary international law without due regard to the Article 38(1)(b) requirements is a direct violation of the doctrine of custom that severely undermines its legitimacy.¹³³ Indirect violation of custom occurs when an international tribunal invokes and applies customary international law, as previously declared by another tribunal, without scrutinizing the basis of such a declaration. It is the latter violation that threatens to perpetuate the cycle of belligerence toward custom. If it becomes part of the Tribunal's practice, indirect violation will negatively impact the Tribunal objective of achieving efficiency. Efficiency in adjudication not only requires that rules be applied equitably and consistently,¹³⁴ but also that rules be established in accordance with previously recognized methods of

126. See ICJ Statute art. 38(1)(b), *supra* note 34, at 1060.

127. ITLOS/Press 16, *supra* note 7.

128. See *id.*

129. See *supra* Part II.B (discussing Article 293).

130. The Tribunal has indicated its readiness to apply customary laws in such cases as *Corfu Channel*, *M/V Saiga*, and *Nicaragua*. See *supra* Part III (discussing these cases).

131. Dunbar, *supra* note 35, at 18.

132. North Sea Continental Shelf, 1969 I.C.J. 3, 175 (Feb. 20) (Tanaka, J., dissenting).

133. See generally CHIGARA, *supra* note 76, ch. 8 (noting that, as the midwife of customary international law, international tribunals ought not to exercise power not conferred by the enabling authority).

134. See *supra* note 9 and accompanying text (reiterating a similar argument).

construction. It might be helpful for the Tribunal, before invoking and applying a rule of customary international law to a dispute under its consideration, to first assure itself that another international tribunal's inauguration of the rule was, in fact, consistent with custom's requirements.